will occur by comparing actual emissions prior to the change with its projection of what annual emissions will be after the change, but only if it reports to EPA on its post-project emissions. 57 Fed. Reg. 32314, 32335 (July 21, 1992)(adding 40 C.F.R § 51.166(b)(21)(v)). This special test, (the "actual-to-projected-actual test") has no application in this case because at the time most of the projects occurred, the rule change was not incorporated into the North Carolina and South Carolina SIPs. Furthermore, Duke Energy never reported on its post-project emissions, so it could not benefit from the rule's provisions in any event.

Whether the "actual emissions" definition, 40 C.F.R § 51.166(b)(21), is interpreted as imposing an "actual-to-potential" test, or an "actual-to-future-actual" test is, for the purposes of this case, irrelevant.[4] Both tests compare annual emissions before and after a project; the regulatory language does not support an interpretation yielding an hourly emissions test. *See* 40 C.F.R § 51.166(b)(21)(ii)("[A]ctual emissions . . . shall equal the average rate, in ***tons per year***, at which the unit actually emitted the pollutant . . . .").

The Fourth Circuit, as mentioned above, never discussed the actual language of the regulations, but the district court did, finding that an exception contained within the definition of "major modification," 40 C.F.R § 51.166(b)(2)(iii)(f), (the "increased hours" exclusion) imposes, despite the language set forth above, the hourly emissions test. Pet. App. 72a. The language focused upon by the district court is as follows:

> (2)(i)"Major modification" means any physical change in or change in the method of operation of a major stationary

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[4] EPA was prepared to proceed in the case using the actual-to-projected-actual test. Pet. App. 58a, n. 17.

source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair, and replacement;

(b) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source . . . ;

(f) ***An increase in the hours of operation or in the production rate***, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations

> approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.
>
> . . .

40 C.F.R § 51.166(b)(2)(emphasis added). The district court ruled that the "increased hours" exclusion required "that in calculating post-project emissions, the EPA must hold the pre-project and post-project hours and conditions of operation constant." Pet. App. 72a.

The district court's analysis was incorrect. As mentioned above, the "modification" test has two elements. First, a source must determine whether a physical or operational change will occur. 40 C.F.R. 51.166(b)(2)(i). Second, if so, the source must determine whether that change will result in a significant net emissions increase. *Id.* By its explicit terms, the "increased hours" exclusion applies at the first step of the analysis, not the second step. Furthermore, the definition of "net emissions increase," 40 C.F.R. § 51.166(b)(3)(i), analyzes whether "a particular physical change or change in the method of operation" at a source has increased emissions. A project that falls within the "increased hours" exclusion could never qualify as the type of "change" that subsection (b)(3)(i) addresses. To put it another way, if the "increased hours exclusion" applies to a project, it would be unnecessary to go on and conduct the "emissions increase" analysis because the activity in question would have already been found exempt.

Thus the plain language of the regulations does not support a conclusion that the "increased hours" exclusion affects the calculation of a "net emissions increase." As the court said in *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272, 1278 (S.D. Ind. 2005): "the plain meaning of the increased hours exclusion is that an increase in hours or production rate are not a 'physical change' and thus cannot, alone, be a modification.

Increased hours and production rate are not excluded from the definition of 'modification'; that is, if a physical change results in an increase in hours of operation that causes a net emissions increase, a modification has occurred."[5]

Accordingly, what the Fourth Circuit should have done in this case is determine, by carefully reading the regulations, whether the district court's interpretation of the regulations was correct. Instead, the Fourth Circuit failed to "interpret" the regulations at all. Instead, it examined whether the regulations comported with its view of what the statute required, and that type of review was reserved by Congress for the D.C. Circuit, which upheld the regulations in the *New York* case, 413 F.3d 3.

C. ALLOWING A COLLATERAL ATTACK OF AN ENVIRONMENTAL REGULATION IN THE CONTEXT OF AN ENFORCEMENT ACTION WOULD UNDERMINE THE ENFORCEMENT SCHEME OF MANY ENVIRONMENTAL STATUTES.

Allowing the type of collateral attack on the regulations that occurred in this case would not only undermine the Clean Air Act's enforcement scheme, but similar restrictions on judicial review established by Congress in many other environmental statutes. Examples abound:

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[5] Indeed, if the hours-of-operation exclusion were interpreted to include increases in hours of operation that resulted from actual physical modifications, it would lead to the following anomalous result: if a project made physical changes to a source that increased the source's capacity to produce in any particular hour, but did not increase the source's availability to operate more hours, then that project would trigger PSD, but if the project increased ***both*** capacity and availability, it would not.

- ***Clean Air Act***. 42 U.S.C. § 7607(b)(1) provides in pertinent part (emphasis added) that:

> ***A petition for review of action of the Administrator in promulgating*** any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, ***or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . .***

42 U.S.C. § 7607(b)(2) provides in pertinent part that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. . . .

Applying these provisions, the Third Circuit, in the context of a criminal proceeding for violations of asbestos removal work practice standards, refused to entertain an argument that the regulation was invalid. *See United States v. Ho*, 311 F 3d 589, 607 (5th Cir. 2002), *cert. denied* 539 U.S. 914, 123 S. Ct. 2274 (2003). *See also Getty Oil Co. (Eastern Operations), Inc. v. Ruckelshaus*, 467 F.2d 349,

359 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) ("Failure to utilize the section 307 proceeding forecloses review in a civil or criminal proceeding for enforcement."); *Commonwealth of Virginia v. United States*, 74 F.3d 517, 525 (4th Cir. 1996)("Because Congress wanted prompt and conclusive review in air quality controversies, it channeled (to the courts of appeals) all challenges, regardless of their basis, of EPA rules and final actions."); *Madison Gas & Electric v. U.S. E.P.A.*, 4 F.3d 529 (7th Cir. 1993) (Challenge to national feature of acid rain program, such as tradability of emission allowances, may be brought only in Court of Appeals for the District of Columbia Circuit, even if impact of program varied greatly across the country).

- ***Clean Water Act.*** 33 U.S.C. § 1369(b)(2); *see Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992)("Reviewability under section 1369 carries a peculiar sting. . . . If an EPA action is reviewable under section 1369(b)(1), then it "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2)."); *see also American Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288-89 (7th Cir. 1989)("the Clean Water Act bars review in enforcement proceedings of actions that could have been reviewed earlier"); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.* 702 F. Supp. 690, 693 (N.D. Ill. 1988)("Section 1369(b)(1)(F) permits review of an EPA action issuing or denying a permit only in the Circuit Court of Appeals. Section 1369(b)(2) then expressly bars review of an EPA-issued or EPA-denied permit in any District Court enforcement proceeding.");

- ***Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")***, 42 U.S.C. § 9613(a); *see U.S. Ecology, Inc. v. Carlson*, 638 F. Supp. 513, 518-19

(C.D. Ill. 1986)(challenge to a listing on the National Priorities List can only be brought in the D.C. Circuit);

- ***Toxic Substances Control Act ("TSCA")***, 15 U.S.C. § 2618(a); *see Dow Chemical Co. v. Costle*, 484 F. Supp. 101, 104 (D. Del. 1980)(court ruled it had no jurisdiction because, although chemical company claimed it was challenging interpretation and application of regulation imposing a ban on manufacture, it was in fact challenging validity of regulation itself);

- ***Resource Conservation and Recovery Act ("RCRA")***, 42 U.S.C. § 6976(a)(2);

- ***Safe Drinking Water Act***, 42 U.S.C. § 300j-7(a).

In statute after statute, Congress has consistently established a sensible system for judicial review. Challenges to regulations must be brought in the D.C. Circuit, and usually within 90 days of promulgation. Enforcement actions are not to be hindered by such challenges. The Fourth Circuit's decision upsets this carefully crafted system for the administration of justice.

D. THE OUTCOME IN THIS CASE COULD HAVE BROAD IMPLICATIONS ON THE AIR QUALITY IN THE NATION'S NATIONAL PARKS.

The nation's national parks are threatened by air pollution. A report issued by the amici NPCA and OCE, along with another organization, Appalachian Voices, details the damage being caused throughout the park system by air pollution focusing on Great Smoky Mountains National Park, Shenandoah National Park, Mammoth Cave National Park, Sequoia and Kings Canyon National Parks, and Acadia

National Park. *See* National Parks Conservation Ass'n, et. al, "Code Red: America's Five Most Polluted National Parks" (September 2002).[6] This report focuses on three types of impact: haze, ground level ozone, and acid precipitation. *Id.* at 1.

The nation's parks are suffering these injuries even though Congress sought to remedy the air pollution problem in parks almost 30 years ago with the Clean Air Act Amendments of 1977. Pub. L. 95-95, 91 Stat. 685 (1977). This Act granted special protections to National Parks. *See* 42 U.S.C. § 7472 (designating national parks over 6000 acres in size as Class I areas) and 42 U.S.C. § 7475(d) (requiring additional measures to insure that new and modified sources seeking permits under the PSD program do not adversely impact Class I areas). deed, the Act contains an entire program dedicated to proving and protecting visibility in Class I areas. 42 U.S.C. §§ 7491-92.

Twenty-nine years ago, Congress stated: "[the] visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide, oxides of nitrogen and particulate matter, especially fine particulate matter, from inadequate[ly] controlled sources." H.R. Rep. 294, 95th Cong. (1977), at 204, 1977 U.S.C.C.A.N. 1077, 1283 (1977). According to the National Research Council, emissions of sulfur oxides from electric utilities "alone are responsible for slightly more than one-half of anthropogenic light extinction. This is because sulfates are the predominant component of anthropogenic haze in the East and electric utilities are the predominant emitter of

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[6] Available at: http://www.npca.org/across_the_nation/visitor_experience/code_red/codered.pdf (last visited March 5, 2005).

SO_2 (sulfur dioxide) in the East. National Research Council, "Protecting Visibility in National Parks and Wilderness Areas" (1993), at 216.

Although EPA has recently developed two rulemakings to curb park-harming emissions from power plants, the Regional Haze Rule, 64 Fed. Reg. 35714, (July 1, 1999) and 70 Fed. Reg. 39104 (Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations), and the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25162 (May 12, 2005), those rules do not supersede the New Source Review rules, and they do not take effect until 2015. *See* 70 Fed. Reg. 39145 (2005).

As Congress debated the 1977 Amendments to the Clean Air Act, it believed that old, uncontrolled plants were being phased out:

> There are in the United States approximately 200 old coal-fired power plants over 20 years of age. These plants are moving into the second half of their useful service life. They are operating at reduced capacity factors--some are used on cyclical or peaking loads only and most operate at less than 50 percent of their stated capacity. They are typically among the most expensive units to operate on a system. Most will be totally phased out of operation in the next 5 to 20 years.

S. Rep. No. 127, 95th Cong. (1977), at 128 (Statement of Senator Baker). Thus, as the D.C. Circuit noted in 1980:

> Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de*

> *minimis* increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are de minimis, and when the increases are offset by contemporaneous decreases of pollutants. . . ."

Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1980); *see also Ohio Edison*, 276 F. Supp. 2d at 850 ("Congress chose to 'grandfather' existing pollution sources from the NSPS and NSR provisions at the time the statute was enacted. . . . Congress did not, however, intend that such existing sources be forever spared the burden and expense of installing pollution control devices.").

This case and others filed by the Department of Justice and citizens seek to bring into compliance sources that have attempted to evade New Source Review requirements on a massive scale. In 1999, along with this case, the Department of Justice filed actions against six other utility companies covering 17 power plants. U.S. Department of Justice, U.S. EPA, "U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act," press release, November 3, 1999.[7] At that time, EPA issued administrative orders and notices of violation covering an additional 15 plants. *Id.* EPA and the Department of Justice estimated that the failure of the identified utilities to comply with the New Source Review regulations had "resulted in tens of millions of tons of sulfur dioxide, nitrogen oxides, and particulate matter illegally emitted into the air." *Id.*

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[7] Available at: http://www.usdoj.gov/opa/pr/1999/November/524enr.htm (last visited March 5, 2006).

Given the seriousness of the air pollution problems in the national parks caused by power plants and other industrial sources, and given the allegations by EPA and the Department of Justice of violations of the New Source Review Regulations by the utility sector, amici urge the Court to grant review of the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GEORGE E. HAYS*
236 West Portal Avenue # 110
San Francisco, CA 94127
(415) 566-5414

MICHAEL COSTA
Our Children's Earth Foundation
100 First Street, Suite 100-367
San Francisco, CA 94105
(415) 896-5289

**Counsel of Record*

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, AND VERMONT, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AS AMICI CURIAE IN SUPPORT OF THE PETITION

PETER H. LEHNER
Chief, Environmental Protection Bureau

ROBERT ROSENTHAL
J. JARED SNYDER
Assistant Attorneys General

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Amici Curiae

(Additional Counsel Listed on Signature Pages)

199844

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF THE *AMICI CURIAE**

This case presents two critical and related issues. The first is whether the Fourth Circuit erred in ruling, contrary to the decisions of this Court and the District of Columbia Circuit, that the United States Environmental Protection Agency ("EPA") lacked authority to interpret the term "modification" in section 111(a)(4) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7411(a)(4), differently under the regulations governing its New Source Performance Standard ("NSPS") and Prevention of Significant Deterioration ("PSD") programs in light of the different purposes of the two programs.[1] The second is whether the Fourth Circuit intruded upon the exclusive jurisdiction of the D.C. Circuit under CAA § 307(b), 42 U.S.C. § 7607(b), by using a CAA enforcement action to review the substantive validity of EPA's nationally-applicable CAA regulations, 25 years after those regulations were promulgated.

Because the States have primary responsibility for administering and enforcing the CAA's regulatory programs, *see Alaska Dept. of Env. Conservation v. EPA*, 540 U.S. 461,

* All parties have consented to the Commonwealth of Pennsylvania Department of Environmental Protection appearing as *amici* on this brief and their consents are being filed herewith. This brief was not authored in whole or in part by counsel for any party. No person or entity other than the *amici* have made a monetary contribution to the preparation or submission of this brief.

1. The PSD provisions of the CAA, 42 U.S.C. §§ 7470-92, cover areas that have already attained the National Ambient Air Quality Standards ("NAAQS"). Although only the PSD requirements are at issue in this case, the Fourth Circuit's decision also applies to areas that have not yet attained the NAAQS, subject to the Nonattainment New Source Review ("NNSR") provisions of the CAA, 42 U.S.C. § 7501-15. The PSD and NNSR programs are together referred to as the New Source Review ("NSR") Program. The acronyms PSD and NSR are used interchangeably throughout this brief.

470, 490 (2004), the decision below uniquely affects the interests of *amici* States in four different ways. First, amici States have an interest in ensuring that the CAA's programs are used, as Congress intended, in a manner that produces and maintains clean air. As this Court has recognized, the PSD program is one of the States' most important tools for reducing air pollution from both in-state and out-of-state sources. *Alaska Dept. Of Env. Conservation*, 540 at 486 (purpose of PSD program "to prevent significant deterioration of air quality in clean-air areas within a State and in neighboring States").

The decision below works a profound change in this area. In the Fourth Circuit and wherever else the decision is applied, sources of pollution will be able to undertake physical changes that increase actual annual emissions without any scrutiny. A plant whose modification enables it to operate more hours may well substantially increase its total annual emissions, even if the modification does not increase its hourly emission rate.[2]

2. The D.C. Circuit, using the facts in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), has aptly illustrated this point:

> In that case, a factory sought to . . . replace old cement kilns that operated 60% of the time with a new kiln that would emit fewer pollutants per hour. . . . Under the interpretation urged by industry petitions, [] the company had not undergone an 'increase' in emissions – and thus would not trigger NSR – since the new kiln would have a lower hourly emissions rate than the old ones. Siding with EPA, the First Circuit agreed that the company had to obtain an NSR permit to make the intended change [because of the projected increase in actual annual emissions resulting from the change].

New York v. EPA, 413 F.3d 3, 15 (D.C. Cir. 2005), *reh'g and reh'g en banc denied*, __ F.3d __ (Dec. 9, 2005). Like the kiln replacement in *Puerto Rican Cement*, the rehabilitation projects at issue here were

(Cont'd)

Under the Fourth Circuit's decision, such rehabilitation projects need not comply with the NSR requirements. The resulting emission increases will harm public health. For example, power plant emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x), two of the pollutants at issue here, lead to the formation of fine particulate matter (soot) and ground level ozone (smog), which will kill tens of thousands of Americans annually and sicken hundreds of thousands of others. U.S. EPA, Proposed Rule to Implement the Fine Particle Ambient Air Quality Standards, 70 Fed. Reg. 65,984, 66,006 col. 3 (November 1, 2005).

Second, the Fourth Circuit's decision will not only hamper the States' efforts to enforce the PSD requirements by changing the substantive standard within that Circuit, but will also cause delay and confusion elsewhere. For example, several of the *amici* are currently enforcing the PSD regulations against facilities located both within and outside their borders whose pollution harms in-state air quality. *See, e.g., United States v. American Electric Power Serv. Corp.* ("*AEP*"), 137 F. Supp.2d 1060 (S.D. Ohio 2001) (eight states and EPA filed claims concerning eight power plants); *United States v. Cinergy Corp.*, 384 F. Supp.2d 1272 (S.D. Ind. 2005) (three states and EPA filed claims concerning six power plants); *Pennsylvania v. Allegheny Energy Inc.*, 2005 US Dist. LEXIS 28894 (W.D. Pa. 2005) (five states alleging violations at three power plants). Defendants in the *AEP* and *Cinergy*

(Cont'd)

intended to increase the future hours of operation of the plants, *see* Petition at 9, resulting in increased annual emissions without increasing the hourly emission rate. *See United States v. Duke Energy*, 411 F.3d 539, 544 (4th Cir. 2005), *reh'g en banc denied*, __ F.3d __ (Aug. 30, 2005).

cases have sought dismissal of the claims at issue there based on the Fourth Circuit's interpretation of the PSD emissions test. The decision below is therefore already acting as an impediment to the reduction of air pollution within and between the States.

Third, proper application of the CAA's provisions about the timing of judicial review is essential to *amici* States because of their role in administering the Act's programs. The CAA's judicial review provisions, including the 60-day limitations period, 42 U.S.C. § 7607(b), ensure that the courts will have determined the validity of any nationally applicable EPA regulations before the States must adopt regulations to implement them. The Fourth Circuit's decision, however, exposes to judicial review long-standing EPA regulations on which the States have based their clean air programs for decades.

Fourth, predictable and uniform application of the PSD program, which is promoted by the provisions of the CAA that confine review of the validity of EPA regulations to a single court, is likewise important to amici States. The Fourth Circuit's ruling effectively invalidates EPA's 1980 PSD regulations in the Fourth Circuit and exposes States outside that circuit to uncertainty about the regulations' meaning in their own jurisdictions. The decision has already led to forum-shopping, as power plant owners filed an unprecedented preemptive lawsuit in the Northern District of West Virginia, apparently in order to use the decision in the present case to challenge alleged violations at plants located in Pennsylvania. *See Allegheny Energy Supply Co. LLC v. Spitzer*, No. 1:05cv04 (N.D.W.Va.).[3]

3. *Allegheny Energy* was filed after issuance of the district court decision below, which was in turn affirmed by the Fourth Circuit.

SUMMARY OF ARGUMENT

A grant of certiorari is warranted to review the Fourth Circuit's decision. First, its finding that EPA must use the same test to identify emissions increases under both its NSPS and PSD programs conflicts with decisions of other circuit courts and of this Court on matters of great public importance. In particular, the decision below is contrary to *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), *reh'g and reh'g en banc denied*, __ F.3d __ (Dec. 9, 2005), in which the D.C. Circuit upheld the same PSD emissions increase test. The court rejected the view, adopted by the Fourth Circuit, that EPA must interpret the statutory term "modification" for the PSD regulations as it does the NSPS regulations, such that only a project that increases a plant's hourly rate of emissions constitutes a "modification" subject to state permitting procedures. *Id.* at 19-20, 39-40. The decision below likewise conflicts with *Wisconsin Electric Power Co. v. Reilly* ("*WEPCo*"), 893 F.2d 901 (7th Cir. 1990), and *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), which recognized and gave effect to the differences between the emissions increase methodologies under the NSPS and PSD regulations. The Fourth Circuit's holding that EPA must construe a single CAA term identically in the regulations governing two different programs is also directly contrary to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) and *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), both of which held that EPA has the authority to construe such a term differently in the NSR and NSPS regulations.

Second, the Fourth Circuit's decision violates CAA § 307(b)(2), which gives the D.C. Circuit exclusive authority to rule on the validity of EPA regulations promulgated under the CAA. The court found that the NSPS and PSD regulations